IN THE

Supreme Court of the United States

October Term 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION,

Respondent.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS,

Petitioner,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

REPLY BRIEF OF PETITIONER STATE OF MINNESOTA

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I. THE TERM "LOCATED" IN 12 U.S.C. § 85, WHICH SECTION PROVIDES THAT A NATIONAL BANK MAY CHARGE INTEREST AT THE RATE ALLOWED BY THE STATE WHERE IT IS LOCATED, SHOULD BE CONSTRUED CONSISTENT WITH THE INTENTION OF CONGRESS AS EVIDENCED BY THE LEGISLATIVE HISTORY. CONGRESS INTENDED THAT INTEREST RATES BE ESTABLISHED BY LOCAL GOVERNMENTS AND DID NOT INTEND THAT A BANK DOING BUSINESS IN OTHER STATES BE ALLOWED TO CHARGE CUSTOMERS IN THOSE STATES THE RATE OF ITS HOME STATE.

Respondent and the amici supporting respondent's position have stressed that section 85 plainly states that the law of the state where the bank is "located" governs interest rates; that respondent is "located" in Nebraska since Omaha is its principal place of business; and that it necessarily follows that Nebraska interest rates govern respondent's credit card accounts wherever it does business.[1] Petitioner State of Minnesota suggests to the contrary; "located" is not a term with a single, precise meaning for all circumstances.

When interpreting "located" as used in the National Bank Act, it is possible that the term could have several meanings. A banking institution is, after all, an intangible corporate entity. As such, "located" could conceivably refer to the location of the entity's principal office, as respondent suggests. Or, it could refer to the principal office of one of its affiliates or subsidiaries. It could refer to a branch office of the entity

[1] *See e.g.* Brief Of The Consumer Bankers Association As Amicus Curiae at 3, 5; Brief Of The First National Bank of Chicago As Amicus Curiae at 5; Brief of Respondent First Of Omaha Service Corporation at 14.

or of one of its affiliates or subsidiaries. Or, instead of referring to an office, "located" could refer to a place where some asset of the bank, its affiliate, or subsidiary is situated. It is also possible that instead of referring to anything physical, "located" could refer to the intangible presence of the corporate entity. In this sense, a bank might be said to be located where either it or one of its affiliates or subsidiaries is incorporated, is licensed to do business as a foreign corporation,[2] or is engaging in economic activity of some kind[3] even though it is not licensed to do business as a foreign corporation. It would be possible for an entity to be "located" in multiple or different locations. The identification of these locations depends upon the context in which the term "located" is used.

As an amicus supporting respondent points out, the term "located" is used in a number of sections of the National Bank Act.[4] This Court has already acknowledged that what located means in the Act depends upon the context in which it is used. In *Citizen's & Southern National Bank v. Bougas*, —— U.S. ——, 98 S.Ct. 88 (1977)—a case decided under the venue provision of the National Bank Act, 12 U.S.C. § 94—this Court

[2] Respondent First of Omaha Service Corporation is licensed in the State of Minnesota to do business as a foreign corporation.

[3] *Cf. McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (defendant foreign insurance company subject to jurisdiction of California court where insurance contract delivered in California, premiums mailed from California, insured resident of California, even though defendant had no offices or agents in California and had done no insurance business there apart from subject policy). Bank of America v. Whitney Central National Bank, 261 U.S. 171 (1923), cited by Amicus First National Bank of Chicago at p. 5 of its brief as holding that the defendant was not located in New York even though it did extensive business there, is not to the contrary. The case says nothing of where the bank is located. It merely holds, under 1923 due process concepts, that the bank did no business in the forum district.

[4] Brief Of The First National Bank of Chicago As Amicus Curiae at 5.

recognized that "there is no enduring rigidity about the word 'located.'" —— U.S. at ——, 98 S. Ct. at 94. The Court acknowledged that in deciding what located means, the legislative history must be consulted. In *Bougas*, it was determined that the intention of Congress in providing that a national bank may be sued in a state court only in the county or city in which the bank is located, was to prevent interruption of a bank's business that might result from compelled production of records in distant forums. This being the purpose behind the "located" language of the venue provision, the Court went on to find that in this day of improved data processing and transportation, the intention of Congress would not be fulfilled by an unduly rigid definition of "located." Accordingly, the Court held that for venue purposes, a bank is located wherever it has a branch office, as well as at its principal office.[5] Flexibility in the application of the term "located" is also demonstrated in *Southland Mobile Homes of South Carolina, Inc. v. Associates Financial Services Company, Inc. and Mellon Bank, N.A.*, 244 S.E.2d 212 (S.C. 1978), *cert. denied* —— U.S. —— (filed Oct. 10, 1978). Denying certiorari, this Court let stand a decision of the South Carolina Supreme Court which held that a foreign national bank which used a local company to handle certain aspects of a loan transaction (such as receiving funds and making disbursements) can be deemed

[5] The precedental worth of section 94 venue cases cited by Amicus First National Bank of Chicago at 5-6 of its brief, *i.e.*, Klein v. Bower, 421 F.2d 338 (2nd Cir. 1970), Buffum v. Chase National Bank, 192 F.2d 58 (7th Cir. 1951), *cert. denied* 342 U.S. 944 (1952); and Helco, Inc. v. First National City Bank, 470 F.2d 883 (3rd Cir. 1972)—must be questioned in light of Bougas.

"located" in South Carolina within the meaning of both sections 12 U.S.C. § 1348 and § 1941. Section 1348 provides that for diversity jurisdiction purposes a national bank is deemed a citizen of the state where it is located, and section 94 provides that suits against national banks must be venued in a state, county or municipal court where the bank is located. Thus, the Pittsburgh bank was "located" in South Carolina even though it did not itself have offices or employees in that state. C.f. *Seattle Trust & Savings Bank v. Bank of California, N.A.*, 492 F.2d 48 (9th Cir. 1974), *cert. denied* 419 U.S. 844 (1974).

Clearly, as with other sections of the National Bank Act, what "located" means in section 85 should be decided only after reviewing the legislative history and Congressional intent. This evidence demonstrates that Congress intended that state governments determine the interest rates to be charged within their borders. The remarks of Congressman Blaine of Maine, Cole of California, and Senators Sherman of Ohio, and Trumbull of Illinois discussed at pp. 21-25 of Petitioner State of Minnesota's initial brief clearly demonstrate this intention. On the other hand, if this Court adopts the definition of "located" advocated by respondent, it will stray far from Congress' basic intention; the extraterritorial application of usury laws could hardly be more contrary to the stated goal of the enactors of section 85. For example, even though a state such as Minnesota may have exercised its police powers to enact strict usury limitations to protect its citizens, a national bank could establish its principal place of business in some

state, such as Maine, New Hampshire, or Massachusetts, which has no maximum contract interest rate limitation,[6] and charge Minnesotans high interest rates with impunity from Minnesota usury laws. This "lowest common denominator" approach to state usury laws has absolutely no support in legislative enactments nor the history surrounding section 85.

Respondent's proposed construction of section 85 would not only have been distasteful to the Congress which enacted section 85, it would also be inconsistent with opinions of this Court which have implicitly recognized the strong interest which individual states have in exercising their police powers to enact interest rate limitations.[7] The very reluctance with

[6] See 1 CCH Consumer's Credit Guide § 510.

[7] *See e.g.* Griffith v. Connecticut, 218 U.S. 563 (1910) (usury limitations are a valid exercise of state's police power); Missouri, Kansas & Texas Trust Co. v. Krumseig, 172 U.S. 351 (1899) (where state enacts law making usurious contracts made within the state void and providing for cancellation and nullification of them, federal courts will not invoke their equity powers to prevent application of the state cancellation and nullification remedies).

In E. C. Warner Co. v. W. B. Foshay Co., 57 F.2d 656 (8th Cir. 1932), *cert. denied* 286 U.S. 558, (1932), a conflict of law case in which the issue was whether the law of Minnesota (where the usurious contract was made and to be performed) or the law of Delaware (where defendant corporation was organized) should apply, the Court commented that a state legislature should not be allowed to bind its sister states in respect to contracts within the sister's territory:

> If the contention of plaintiff was accepted, however, the state of Delaware has enacted a police measure controlling in Minnesota, irrevocable by a Minnesota Legislature although a Minnesota Legislature would be powerless to tie the hands of succeeding Legislatures . . . 'The police power is an attribute of sovereignity.' We are not convinced that the state of Delware can impose upon the State of Minnesota a statute which, if given the effect contended for must result in the foreign state exercising a portion of the police power of the state of Minnesota and to that extent its sovereign power.

57 F.2d at 663 (citations omitted).

which the Minnesota Supreme Court reached the decision here on appeal reflects the strong Minnesota policy concerning interest rates. Recently, Iowa rendered an opinion wholly consistent with this position. In *Iowa ex rel. Turner v. First of Omaha Service Corp.*, —— Iowa ——, 269 N.W.2d 409 (August 30, 1978), the Iowa Supreme Court held that Iowa's Consumer Credit Code interest rates applied to a foreign national bank soliciting and extending credit to Iowa citizens. It held that Congress did not intend in section 85 to give national banks engaged in interstate lending such favored status that they could avoid all provisions of Iowa usury law.

Petitioner State of Minnesota submits that the Court can and should construe the term "located" consistent with the legislative history of section 85 and consistent with the strong interest of the state legislatures in controlling interest rates charged within their borders. In the context of a national bank which systematically solicits Minnesota residents for credit cards to be used in transactions with Minnesota merchants the bank must be deemed to be "located" in Minnesota for purposes of this credit card program.

II. SECTION 86 DOES NOT PREEMPT STATE LAW WHICH ALLOWS INJUNCTIONS PROHIBITING CHARGING OF USURIOUS INTEREST.

Respondent contends[8] that section 86 of the National Bank Act provides the exclusive remedy for usurious interest rates charged by national banks, and that it preempts all state remedy provisions. Respondent then concludes that since none of the petitioners have been charged interest under respondent's credit card program they lack standing to sue under section 86.

[8] Respondent's brief at 11.

Section 86 neither preempts the injunctive relief provisions of Minn. Stat. § 48.185, subd. 7 (1976) of the Minnesota Bank Credit Card Act, nor state common law under which this action has been maintained.[9] Section 86[10] provides that a national bank which charges interest in excess of the limitations of 12 U.S.C. § 85 forfeits the entire interest charged, and is liable to the debtor for a penalty in the amount of twice the interest paid. The courts have held since *Farmers and Merchants National Bank v. Dearing*, 91 U.S. 29 (1895), that a debtor charged usurious interest by a national bank cannot avail himself of *penalties* provided under a state usury law, but is limited to the recovery authorized by section 86. However, neither the express language of section 86 nor the cases construing that section address the propriety of types of relief that are not punitive in nature, such as the *injunctive relief* authorized by subdivision 7 of the Minnesota Bank Credit Card Act or by state common law. In *State v. The First National Bank of Clark*, 2 S. D. 568, 51 N.W. 587 (1892), *appeal*

[9] Minn. Stat. § 48.185, subd. 7 (1976) provides in pertinent part:

> Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section.

Petitioner Marquette National Bank brought suit under this section as a bank injured competitively by respondent's violations of Minn. Stat. § 48.185. The State of Minnesota was granted plaintiff-intervenor status and filed its own complaint seeking declaratory, injunctive and other relief under section 48.185, subd. 7 and upon common law public nuisance grounds.

[10] 12 U.S.C. § 86 reads in pertinent part:

> The taking . . . or charging a rate of interest greater than is allowed by the preceding section [12 U.S.C. § 85], when knowingly done, shall be deemed a forfeiture of the entire interest. . . . In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back . . . twice the amount of the interest thus paid from authorities taking or receiving the same. . . . .

dismissed, 163 U.S. 686, the court held that section 86 did not preclude prosecution of a national bank under a South Dakota statute which defined the taking of illegal interest as a misdemeanor. The court held that section 86 was directed only to redress between the parties to the loan, and did not displace the state's exercise of its police power. Similarly, in this case the State of Minnesota is seeking injunctive relief for violation of a statute enacted under its police powers.

To assert that the cases should be interpreted to preclude injunctive relief to a state acting under its police powers, would do great violence to the philosophy espoused by this Court in *First National Bank in St. Louis v. State of Missouri*, 263 U.S. 640 (1923). In that case the Attorney General of Missouri sought to enforce a state statute prohibiting branch banking against a national bank. The Court described the interrelationship between state and federal regulation of national banks as follows:

> National banks are brought into existence under Federal legislation, are instrumentalities of the Federal government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of the state in respect to their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States.

263 U.S. at 656 (citations omitted). The Court concluded that the Missouri prohibition of branch banking did not interfere with any of the federal policies embodied in the National Bank Act. It further held, in language directly applicable to the case at bar, that Missouri could enforce its branch

banking law against the national bank through a *quo warranto* proceeding in its state court:

> . . . since the sanction behind [the state statute] is that of the state, and not that of the national government, the power of enforcement must rest with the former, and not with the latter. To demonstrate the binding quality of a statute, but deny the power of enforcement, involves a fallacy made apparent by the mere statement of the proposition; for such power is essentially inherent in the very conception of law . . . . What the state is seeking to do is to vindicate and enforce its own law; and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation . . . . Having determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute. *In other words, the national statutes are interrogated for the sole purpose of ascertaining whether anything they contain constitutes an impediment to the enforcement of the state statutes; and the answer being in the negative, they may be laid aside as of no further concern.*

263 U.S. at 660-661 (emphasis added). This Court's philosophy of allowing state regulation, except where it directly conflicts with federal regulation, should not be abandoned in this case since it is based on long-standing congressional policy[11] and precedent. Moreover, recognition of the strong state

[11] See Brief of Petitioner State of Minnesota at 10-13. Brief of Petitioner Marquette National Bank at 21-22; Brief of Amicus Conference of State Bank Supervisors at 19-22.

interest in usury laws would follow this Court's recent preemption rulings in which it has viewed invalidation of state regulation with disfavor and has urged that state and federal regulatory schemes be reconciled whenever possible.[12]

It is not difficult to reconcile the limitations on recovery by a wronged debtor provided in section 86 with the authorization to enjoin the taking of usurious interest provided in subdivision 7 of the Minnesota Bank Credit Card Act, and with the common law authority of the State of Minnesota to enjoin usury as a public nuisance. The federal law is designed to insure a punitive remedy for debtors who have already been charged usurious interest; the Minnesota law is designed to protect the public interest by preventing lending banks from charging usurious interest to future customers. The Minnesota law does not conflict with the federal law. To the contrary, it complements the federal law by providing an effective remedy against national banks which repeatedly disregard the limitations of that law. As the *St. Louis Bank* case illustrates, application of state law remedies to national banks is appropriate wherever state law has not been displaced by federal law. Accordingly, 12 U.S.C. § 86 does not bar the use of state law remedies to enjoin respondent's violation of the limits on credit card interest charges.

[12] See Brief of Petitioner State of Minnesota at 7-10.

III. EVEN UNDER THE MOST-FAVORED LENDER DOCTRINE ADVANCED BY RESPONDENT, NATIONAL BANKS CANNOT UTILIZE INTEREST PROVISIONS OF A STATE STATUTE SUCH AS THE MINNESOTA SMALL LOAN ACT, AND IGNORE THE OTHER SUBSTANTIVE PROVISIONS OF THE SMALL LOAN ACT AND THE STATE CASE LAW INTERPRETING THAT STATUTE.

The respondent argues[13] that because it is a national bank, it can charge 18 percent interest on its credit card transactions under the "most-favored lender" theory, first announced in the case of *Tiffany v. National Bank of Missouri*, 18 Wall. (85 U.S.) 409 (1873). Respondent urges that the *Tiffany* decision allows national banks to utilize any state statute which permits another lender in the state to charge a higher interest rate than that allowed to a state bank[14] regardless of the type of loan. Respondent reasons at page 23 of its brief, that since section 86 as interpreted in *Tiffany* authorizes it to utilize the highest interest rate allowed any other lender under Minnesota law, it may, in connection with its Bank-Americard program in Minnesota, charge the rates permitted Minnesota small loan companies.[15]

[13] Respondent's brief at 23-24.

[14] The Court in Tiffany based its holding on language of section 85 which provides that a national bank can charge interest at the rate allowed by the laws of the state where a bank is located, and no more "except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." The Court reasoned that unless national banks were allowed to charge the highest rates allowed state lenders, national banks might fall victim to state legislatures bent on discriminating against state banks. Consequently, this would place national banks at a disadvantage in relation to the favored state lenders allowed to charge higher rates.

[15] See Minn. Stat. §§ 56.01-56.26 (1976).

Although there is authority which would permit a national bank under certain circumstances to use the interest rates allowed a most-favored lender (such as a small loan company), respondent's contention is erroneous since the national bank must strictly adhere to the limitations of the state statute concerning, for example, size maturity, and compounding of interest on the loan.[16] See *Citizens' National Bank of Kansas City v. Donnell*, 195 U.S. 369 (1904) (if state law prohibits compounding of interest, national bank may not compound *even though* the interest as compounded does not exceed the maximum allowable uncompounded, simple interest); *Acker v. Provident National Bank*, 512 F.2d 729 (3rd Cir. 1975) and *Partain v. First National Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972) (if state law prohibits compounding of interest, national bank may not compound); *American Timber & Trading Co. v. First National Bank of*

[16] Respondent and Amicus The Consumer Bankers Association cite a number of cases and imply that they hold that a national bank can select the highest rate allowed any lender in a state, irrespective of the rate allowed state banks. However, it is clear that this was not the issue in these cases. Farmers & Merchants National Bank v. Dearing, 91 U.S. 29 (1875) (whether state penalty or section 86's penalty applies); Hazeltine v. Central National Bank, 183 U.S. 132 (1901), (whether section 86 was the applicable penalty); Evans v. National Bank of Savannah, 251 U.S. 108 (1919), (whether section 86 applies to discounting on single-payment short term notes); Barnet v. Muncie National Bank, 98 U.S. 555 (1879), (whether penalty provisions of section 86 applied under the facts of the case); Daggs v. Phoenix National Bank, 177 U.S. 549 (1900), (whether section 86 applied under the facts); and Schuyler National Bank v. Gadsden, 191 U.S. 451 (1903), (what was national bank rate under Section 85, if state law allowed all lenders any rate if agreed to in writing). In addition, all of the cases cited by Respondent and The Consumer Bankers Association deal with fact situations where the national bank was doing business in a state where it was chartered, not where the bank was dealing in interstate loans, and attempting to select the most favorable rate allowed a lender other than a state bank. These were *not* cases where a national bank was attempting to select the usury law of one type of loan transaction and apply it to a totally different type of credit transaction.

Oregon, 511 F.2d 980 (9th Cir. 1973) *cert. denied* 421 U.S. 921 (1975) (if state law prescribes a certain method of interest computation, national bank may not compute interest otherwise); *First National Bank in Mena v. Nowlin*, 509 F.2d 872 (8th Cir. 1975) (if state law prohibits discounting of interest on installment loans, national bank cannot discount). Moreover, it has been held that the National Bank Act adopts the entire case law of the state which interprets the state's limitations on usury. *First National Bank in Mena v. Nowlin, supra.* Various opinions and letters of the Comptroller of the Currency reflect the clear rule of law that national banks must comply with the limitations of state law if they wish to avail themselves of a most-favored lender provision. The Comptroller's Digest of Opinions at paragraph 9510, cited in *Partain v. First National Bank of Montgomery*, stated that:

> Where state law permits a higher-than ordinary interest rate on specified classes of loans (for example, small loans), a national bank which makes loans at such special rates is subject to all limitations of substance with respect to size, maturity of the loan, and the like, which are prescribed by the State statute authorizing the higher rate.

Partain v. First National Bank of Montgomery, supra, 467 F.2d at 173 n. 5. A letter of a Deputy Comptroller also cited in *Partain* stated:

> [A]s to loans made at higher than ordinary interest rates, the specifications of the state statute with respect to maturity, size and method of repayment of the loan would be applicable since they are component parts of the laws permitting higher than ordinary interest charges.

Id. Thus, it is clear under both the case law and the Comptroller's opinions and letters that a national bank may not select the interest rate from a most-favored lender statute, and ignore the other provisions of the statute defining the conditions and limitations under which a lender may make that type of loan.

In the present case, respondent cannot use Minnesota's small loan law as a basis for the interest rates it charges on its credit card program, because the program does not conform to limitations of the small loan law. First, the small loan law applies only to "closed-end" loans; that is, loans of a specified amount and for a specified period of time. Respondent's program, however, contemplates loans which are "open-ended." Their amounts vary with the customer's use of the card and are therefore not specified in terms of amount. And respon-

dent's program contemplates an extension of credit which may go on for a virtually indefinite period of time—if a cardholder does not pay a monthly bill, the loan is extended indefinitely or, at least, until collection activity by respondent is initiated. Therefore, the loans of respondent's program are not specific as to the period of time over which they are extended.

Second, the small loan law does not permit loans greater than $1,200. Under respondent's program, loans of undetermined maximum amounts well in excess of $1,200 could be made.

Third, the small loan act allows varying rates of interest, the allowable rate varying with the amount of the loan. At the loan amount of $600, the small loan act would allow an interest rate of 15%. Under respondent's program, however, 18% would be charged on a $600 loan. Other examples of how respondent's credit card program does not conform with the small loan act could be given.

The purpose of the "most-favored lender" theory was to ensure that national banks have competitive equality with local lenders making the same kind of loans. Since small loan companies do not operate credit card plans they are not competitors in this commercial area. There is no policy justification for extending the "most-favored lender" theory in these circumstances. Thus, respondent's deviations from the requirements of Minnesota's small loan law surely defeat its claim that the interest rates permitted by that law justify using 18% interest rates in its BankAmericard program in Minnesota.

IV. THIS COURT SHOULD NOT ENTERTAIN RESPONDENT'S CLAIM THAT THE COURT BELOW MISINTERPRETED MINN. STAT. § 48.185 IN FINDING THAT STATUTE APPLICABLE TO RESPONDENT'S ACTIVITY ON BEHALF OF THE OMAHA BANK.

Respondent argues as an alternative basis for affirmance of the decision of the court below that its actions and proposed actions on behalf of the Omaha Bank do not bring it within the scope of Minn. Stat. § 48.185 subd. 7 (1976).[17] This claim is a state law issue which has been determined adversely to respondent by the Minnesota Supreme Court and, therefore, is not subject to review by this Court. The finality of a state high court's determination of a substantive state law question has been settled since *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590 (1875).[18]

In the case at bar the Hennepin County District Court ruled:

> As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has

[17] Respondent's brief at 24-25.
[18] See generally C. Wright, A. Miller, E. Cooper & E. Gressman, 16 Federal Practice and Procedure § 4021 at 675-682 (1977).

violated and threatens to continue to violate Minnesota Statutes, § 48.185.[19]

The Minnesota Supreme Court first noted that the district court had treated the case against respondent as if its parent organization, the Omaha Bank, were the defendant. App. 161a. The Minnesota Supreme Court accepted this finding without reexamining the question because it stated in the next paragraph that "[t]he principal issue is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state."[20]

Therefore, the applicability of section 48.185 to respondent's activities in Minnesota on behalf of the Omaha Bank has been decided by the Minnesota Supreme Court and should not be reviewed by this court.

V. THE PETITIONS FOR CERTIORARI WERE TIMELY FILED.

The petitions for certiorari were filed within ninety days of the Clerk's entry of the Minnesota Supreme Court's judgment. This Court was thereby vested with jurisdiction to review the Minnesota Supreme Court's judgment pursuant to 28 U.S.C. § 2101(c). Respondent suggests at pages 6-9 of its brief, however, that because in respondent's view the Minnesota Supreme Court "did not contemplate or intend" that any judgment be entered by the Clerk, the judgment must apparently

[19] Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment of the Hennepin County District Court (No. 726526, Feb. 10, 1977), at App. 129a.

[20] The Minnesota Court's application of section 48.185 to a subsidiary of a national bank parallels the Comptroller of the Currency's regulation applying all federal banking laws, in the absence of an express exemption, to operating subsidiaries of a national bank. 12 C.F.R. § 7376 (d).

be regarded as a nullity from which petitioners could not seek review.

Respondent's argument as to the intentions of the Minnesota Supreme Court notwithstanding, it cannot be disputed that the Clerk of the Minnesota Supreme Court did in fact enter that Court's final judgment promptly upon disposition by the Court of the petition for rehearing[21]. Surely, petitioners were entitled to rely on this judgment, the entry of which remains undisturbed and unchallenged by respondent in the Minnesota Supreme Court, in computing the time to seek review in this Court.

Furthermore, respondent's suggestion that the Supreme Court of Minnesota never intended that judgment be entered is completely unfounded. Both the order of the Minnesota Supreme Court denying petitioner Marquette National Bank's request for rehearing and the subsequent order denying respondent's motion to vacate its stay refer to a "stay of judgment" by the Minnesota Court.[22] Respondent speculates that the words "stay of judgment" indicate that the Minnesota Court intended to stay entry of judgment pending application for review in this Court. But it is far more reasonable to construe the Minnesota Court's order as a stay of the "execution" of its judgment pursuant to 28 U.S.C. § 2101(F) rather than a stay of entry of judgment. It can be inferred that this interpretation was applied by the Minnesota Court's Clerk when he proceeded to enter judgment upon the Minnesota Court's order of December 8, 1977. It can also be inferred that

[21] Indeed, it would appear that under the Rules of the Minnesota Supreme Court the Clerk may have had a duty to proceed with entry of judgment upon disposition of the petition for rehearing:

> The filing of a petition for rehearing stays the entry of judgment *until disposition of such petition*.

Rule 140, Minn. R. Civ. App. P. (emphasis added); Brief for petitioner the Marquette National Bank, Add-9.

[22] App. 197a, 204a.

the Minnesota Supreme Court viewed its stay of judgment in the same light, inasmuch as it rejected respondent's motion to vacate the stay which was premised upon the argument that timely application for writs of certiorari had not been made.[23]

As the petitions for certiorari clearly were filed within ninety days of the Minnesota Supreme Court's judgment, they are timely within the rule laid down in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924). However, respondent erroneously intimates that this Court's holding in *Puget Sound* was overruled *sub silentio* by a subsequent dictum in *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). In *Puget Sound*, the Court held that where local practice provides for the entry of judgment in a state appellate court following the filing of that court's decision, it is from the date of the appellate court's judgment and not the date of decision that the period for seeking review in the United States Supreme Court is to be computed. The *Pink* case, on which respondent relies, dealt with the separate question of whether the date of entry of judgment in the state appellate court or the later date of entry of judgment by the trial court on remittitur from the state appellate court was the proper date from which to compute the period for review. As in *Puget Sound*, the Court in *Pink* held that the period for review must be computed from the time of the state appellate court's judgment. In a latter decision, *Commissioner v. Estate of Bedford*, 325 U.S. 283 (1945), the Court implicitly reaffirmed *Puget Sound*, and distinguished *Pink* from those cases where established local practice provides for the entry of a formal judgment in the *appellate* court. The Court in *Bedford* upheld as timely, a writ of certiorari filed within sufficient time after filing by the clerk of a federal appellate court's "judgment"

[23] App. 200a-204a.

but too long after the filing of the court's "opinion."[24] The *Pink* decision is therefore inapposite to cases such as the instant one, where the established practice is to enter judgment in the state appellate court. This court should hold that the petitions were timely and that it has jurisdiction to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

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[24] The practice of the Second Circuit at the time of the *Bedford* decision was to first issue its "Opinion" following which its clerk would proceed to file an "Order for Mandate," the latter document having the essential attributes of a judgment. Commissioner v. Estate of Bedford, 325 U.S. 283, 285-96 (1945).